IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Nayabdeen Khan & Others Vs. State of Rajasthan
(S.B. CRIMINAL APPEAL NO.1253/2002)

S. B. Criminal Appeal under Sec.374 (2) Cr.P.C. against the judgment dated 6-9-2002 in Sessions Case No.51/1998 passed by Sh. Nathu Lal Chanpawat, RHJS, Additional Sessions Judge, Rajgarh District Alwar.

Date of Judgment: March 29, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA

Mr. Biri Singh Sinsinwar] for the appellants.
Mr. Kamlendra Sihag]

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT:

Nayabdeen Khan, Khursheed, Mst. Mohammadi and Leela Khan, the appellants herein, were put to trial before learned Additional Sessions Judge Rajgarh District Alwar, who vide judgment dated September 06, 2002 convicted and sentenced them as under:-

U/s.304B IPC:

Each to undergo rigorous imprisonment for ten years and fine of Rs.1000/- in default to further suffer three months simple imprisonment.

U/s.498A IPC:

Each to undergo two years rigorous imprisonment and fine of Rs.500/- in default to further suffer one month simple imprisonment.

The substantive sentences were ordered to run concurrently.

2. The informant Nabi Khan (Pw.3) submitted a written report at Police Station Rajgarh on July 11, 1998 with the averments that his daughters Farida and Rabina (since deceased) were married to Khursheed and Nayabdeen Khan (appellants). Soon after their marriage Farida and Rabina were harassed by their husband and in-laws for the demand of Maruti, Hero-honda motor cycle and more money. In the morning of July 11, 1998 the informant received information about death of Farida and Rabina. On that report case under sections 304B and 498A was registered and investigation commenced. Dead bodies were subjected to autopsy. Statements of witnesses were recorded. After usual investigation charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge Rajgarh District Alwar. Charges under sections 498A and 304B IPC were framed against the appellants, who denied the charges and claimed trial. The prosecution in support of its case examined as many as 18 witnesses. In the explanation under Sec.313 CrPC, the appellants claimed innocence. Two witnesses in defence were examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated herein above.

3. I have heard learned counsel for the parties and with their assistance weighed the material on record.

4. Factual situation emerges from the material on record may be summarized as under:-

(i) As per site plan (Ex.P-11) dead bodies of Farida and Rabina were found lying in the well of Gheesa, shown by Mark `A'.

(ii) Although in the post mortem report cause of death of Farida and Rabina was asphyxia as a result of throttling, Dr. D.R. Meena (Pw.12) member of Medical Board deposed in the cross examination thus:-

> "मैं यह नहीं कह सकता कि यदि कोई व्यक्ति कुए में गिर जाये और उसको निकालते समय म्रत्यु हो जाये तब ये सभी लक्षण मौजूद हों"

(iii) Chhote Lal (Pw.5) deposed as under:-

> "खुर्शीद की पत्नी व नायबदीन की पत्नी कुए में गिर कर मर गई, रोला हुआ तब मैं कुए पर गया था। कुए पर चप्पल खुली हुई मिली थी ... दोनों औरतों को बिलाई से कुए के बाहर निकाली ... दोनों औरतों के पीहर वालों को बुलवाया था।"

In the cross examination Chhote Lal stated that:

> "यह सही है कि घीसा के दोनों लडकों की शादी सऩ 90 में हुई थी।"

(iv) Jhad Mal (Pw.1) neighbour of appellants deposed that the dead bodies of Farida and Rabina were found in the well and their marriage was taken place in 1990.

(v) Sammi Khan (Dw.1) neighbour of appellants, stated that he participated in the marriage of Nayabdeen and Khursheed which was solemnised in 1990.

(vi) Mohd.Salim (Dw.2) stated that he was Imam of the village and he performed Nikah ceremony of Nayabdeen and Khursheed in 1990.

(vii) Nabi Khan (Pw.3) father of Rabina and Farida in his cross examination admitted that at the time of marriage no dowry was agreed. He also admitted that his daughters attended the marriage of his son and at that time no complaint of ill treatment was made by them.

(viii) From the statements of Sumer Khan (Pw.7) and Chhoti (Pw.13) it does not appear that soon before their death Farida

and Rabina were subjected to harassment in connection with demand of dowry.

5. The expression `dowry' is defined by Section 2 of the Dowry Prohibition Act,1961 (for short `the Act'), as meaning anything which is given either directly or indirectly, by one party to a marriage to the other party to the marriage or by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person" at or before or after the marriage as consideration for the marriage of the said parties. The act has been amended by Act 63 of 1984 and Act 43 of 1986. Formerly dowry was defined as property given as consideration for the marriage but the words "as consideration for the marriage" have been omitted and substituted by the words "in connection with the marriage". Now dowry means any property given or agreed to be given by the parents of a party to the marriage at marriage or before marriage or at any time after marriage in connection with the marriage.

6. Considering the definition of dowry their Lordships of Supreme Court in Reema Aggarwal Vs. Anupam (2004)3 SCC 199, indicated thus:-

(Para 14)

> "The definition of the term "dowry" under Section 2 of the Dowry Act shows that any property or valuable security given or "agreed to be given" either directly or indirectly by one party to the marriage to the other party to the marriage "at or before or after the marriage" as a "consideration for the marriage of the said parties" would become "dowry" punishable under the Dowry Act. Property or valuable security so as to constitute "dowry" within the meaning of the Dowry Act must, therefore, be given or demanded "as consideration for the marriage".

7. Interpreting the words “in connection with the marriage of the said parties”, the Apex court in Satvir Singh Vs. State of Punjab (2001)8 SCC 633, propounded as under:-

> “The word “dowry” in Section 304-B has to be understood as it is defined in Section 2 of the Dowry Prohibition Act,1961. Thus, there are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third is “at any time” after the marriage. The third occasion may appear to be an unending period. But the crucial words are “in connection with the marriage of the said parties”. This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with the marriage of the parties. There can be many other instances for payment of money or giving property as between the spouses. For example, some customary payments in connection with birth of a child or other ceremonies prevalent in different societies. Such payments are not enveloped within the ambit of “dowry”.
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> (Emphasis supplied)

8. The word “agreement” referred in Section 2 has also been considered in Pawan Kumar Vs. State of Haryana (1998)3 SCC 309, by their Lordships of Supreme Court and it was observed as under:-

(Para 16)

> “Demand for dowry neither conceives nor would conceive of any agreement. The word “agreement” referred to in Section 2 of the Dowry Prohibition Act,1961 has to be inferred on the facts and circumstances of each case. The interpretation that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. “Dowry” definition is to be interpreted with the other provisions of the Act including Section 3, which refers to giving or talking dowry and Section 4 which deals with penalty for demanding dowry, under the 1961 Act and the Indian Penal Code. This makes it clear that even demand of dowry on other ingredients being satisfied is punishable. This

> leads to the inference, when persistent demands for TV and scooter are made from the bride after marriage or from her parents, it would constitute to be in connection with the marriage and it would be a case of demand of dowry within the meaning of Section 304-B IPC. It is not always necessary that there be any agreement for dowry."

9. That takes me to the question as to whether the appellants have committed the dowry death of Farida and Rabina? Section 113-B of the Evidence Act provides that when the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

10. Analysing the words `soon before her death their Lordships of the Supreme Court in Kamesh Panjiyar Vs. State of Bihar (2005)2 SCC 388, held as under:-

> "A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that "soon before her death", the victim was subjected to cruelty or harassment "for or in connection with the demand of dowry". Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before her death" is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. "Soon before" is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the

> importance of a proximity test as indicated by the said expression both for the proof of an offence of dowry death as well as for raising a presumption under section 113-B of the Evidence Act. A reference to the expression "soon before" used in Section 114 illustration (a) of the Evidence Act is relevant. The determination of the period which can come within the term "soon before" under section 114 illustration (a) is left to be determined by the courts, depending upon the facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effects of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence."
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> (Emphasis supplied)

11. In K.Prema S.Rao Vs. Yadla Srinivasa Rao (AIR 2003 SC 11) their Lordships of Supreme Court examined the words `soon before her death' and observed as under:-

> "To attract the provisions of S.304-B, IPC, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty and harassment `in connection with the demand for dowry'. There is no evidence on record to show that the land was demanded as a dowry. It was given by the father to the deceased in marriage ritual as "pasupukumuma". The harassment or cruelty meted out to the deceased wife by the husband after the marriage to force her to transfer the land in his name was `not in connection with any demand for dowry'. One of the main ingredients of the offence of "demand of dowry" being absent in this case, the accused could not be said to have committed offence under S.304-B."

12. A bare look at the evidence on record goes to show that the

harassment or cruelty meted by the deceased was not in connection with any demand of dowry. The medical evidence adduced by the prosecution could not however proved beyond reasonable doubt that the death of Farida and Rabina was homicidal in nature. Possibility that Farida and Rabina committed suicide by jumping into well, cannot be ruled out. Existence of a proximate and live link between the effects of cruelty based on demand and the death is missing. It is however established that Farida and Rabina met with the death because their husband appellants Nayabdeen and Khursheed treated them cruelly. Clause (a) of the Explanation under section 498-A IPC defines cruelty to mean a "willful conduct of the husband of such nature as is likely to drive the woman to commit suicide". In the instant case it is established from the ocular evidence that the husband appellants harassed and treated Farida and Rabina cruelly. As a result of such cruel treatment Farida and Rabina were driven to meet the suicidal death. Thus offence of abetment of committing suicide punishable under section 306 IPC is clearly made out against appellants Nayabdeen and Khursheed and for that purpose presumption under section 113-A of the Evidence Act can be raised against them. Section 306 IPC and Section 113-A Evidence Act read thus:-

> "306: Abetment of suicide.- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to file."
> "113-A: Presumption as to abetment of suicide by a married woman.- When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of

her husband.
Explanation- For the purposes of this section cruelty shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860)."

13. From the material on record it is evident that husband appellants are guilty of cruel treatment of deceased, as a result of which they were forced to commit suicide. On such evidence the presumption which arises under section 113-A of the Evidence Act is that both the husband of both deceased abetted them to commit suicide. The word `cruelty' as mentioned in the Explanation below Section 113-A of the Evidence Act has been given the same meaning contained in the Explanation below Section 498A IPC. On the facts established, the willful conduct of appellants in neglecting and harassing the deceased was so cruel that they were driven to commit suicide and the offence of abetment of committing suicide, punishable under section 306 IPC is proved against appellants Nayabdeen and Khursheed. I am of the view that charges under sections 498A IPC are proved against the husband appellants. However the prosecution failed to prove any charge against appellants Mst.Mohammadi and Leela Khan.

14. Although charge under section 306 IPC was not framed against appellants Nayabdeen and Khursheed but omission to frame charge under section 306 IPC has not resulted in any failure of justice. In Hira Lal Vs. State (Govt.of NCT) Delhi (2003)8 SCC 80, their Lordships of Supreme Court in a similar situation observed as under:-

"Though no charge was framed under section 306 IPC, that is inconsequential. On the facts of the case, even though it is difficult to sustain the conviction under section 304-B IPC, there is sufficient material to convict the accused-appellants in terms of Section 306 IPC along with Section 498A IPC"

15. For these reasons, I dispose of instant appeal in the following terms:-

(i) I allow the appeal of appellants Mst. Mohammadi and Leela Khan and acquit them of the charges under sections 498A and 304B IPC. Appellant Mst. Mohammadi is on bail, she need not surrender and her bail bonds stand discharged. Appellant Leela Khan who is in jail, shall be set at liberty forthwith, if he is not required to be detained in any other case.

(ii) I partly allow the appeal of appellants Nayabdeen Khan and Khursheed and instead of section 304B IPC, I convict each of them under section 306 IPC and sentence them to suffer rigorous imprisonment for a period of five years and fine of Rs.1000/- in default to further suffer three months rigorous imprisonment. I however maintain their conviction and sentence under section 498A IPC.

(iii) The impugned judgment of learned trial court stands modified as indicated above.

(Shiv Kumar Sharma)J.

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